THE

SUPREME COURT OF THE UNITED STATES.

No. 678.

FOR THE OCTOBER TERM, 1893.

PHILLIP WERLEIN, PLAINTIFF IN ERROR,

versus

CITY OF NEW ORLEANS, DEFENDANT IN ERROR.

Comes now the appellee, by its counsel appearing in that behalf, and moves the Court to dismiss the appeal in the above entitled cause for want of jurisdiction, because the judgment or decree from which the said appeal purports to have been taken is the judgment or decree of the Supreme Court of one of the United States, to-wit, the Supreme Court of the State of Louisiana, and that there is no Federal question involved.

And the said appellee, by counsel as aforesaid, also moves the Court to affirm the said judgment or decree from which the said appeal purports to have been taken, because, although the record in the said cause may show that this Court has jurisdiction in the premises, yet it is manifest that said appeal was taken for delay only.

Sam'l L. Gilm

Counsel for Appellee.

SUPREME COURT OF THE UNITED STATES.

FOR THE OCTOBER TERM OF 1898

No. 678.

PHILIP WERLEIN, PLAINTIFF IN ERROR,

versus

CITY OF NEW ORLEANS, DEFENDANT IN ERROR.

STATEMENT OF THE CASE.

The city of New Orleans in its capacity of administrator of all property within its limits, dedicated to public use, instituted this suit in the Civil District Court in the parish of Orleans and State of Louisiana for the possession of a certain portion of ground situated in the city of New Orleans—alleging that said property had been dedicated to public use as a public park, or place, and was formerly known as "Place Gravier," and that defendant was in the unlawful possession thereof.

Defendant answered and avers that he held title to said property by mesne conveyances from one Andrew C. Lewis, who acquired same at marshal's sale, made under a writ of *fieri facias*, issued in the suit of John Klein vs. The City of New Orleans, No. 7801, of the docket of the

United States Circuit Court for the Eastern District of Louisiana.

Defendant further averred that under a judgment rendered in suit of Klein vs. City a writ of *fieri facias* issued and the property in controversy was seized thereunder and advertised for sale; that the city of New Orleans enjoined the sale thereof in cause entitled "City of New Orleans vs. John Klein," No. 8461 of the docket of the United States Circuit Court, alleging that Klein had no right to issue the writ of *fieri facias* above referred to, for the reasons that he had caused his judgment to be registered in the office of the Administrator of Public Accounts under the provisions of Act No. 5 of the Extra Session of the Legislature of 1870 and was without other remedy, and had transferred all his title and interest in and to the judgment to Messrs. Lesassier and Binder; that on the 19th day of June, 1878, a final decree and judgment was rendered by said Court against the city of New Orleans and in favor of John Klein, in said suit No. 8461, whereby said injunction was dissolved, and the property was then sold as above stated. Defendant plead said judgment as *res adjudicata*. Defendant also plead prescription and estoppel by conduct.

The plea of *res adjudicata* was tried in the court of the first instance by way of exception, and was overruled. The case came on for trial on its merits, and judgment was rendered for plaintiff as prayed for. Defendant appealed to the State Supreme Court, and the judgment of the lower court was affirmed, and defendant is now here as plaintiff in error to this Court.

Argument.

The motion to dismiss herein is made upon the following grounds:

I.

The Court has no jurisdiction to review a judgment of the highest Court of a State unless a federal question has

been either in expressed terms or by necessary effect decided by the Court against the plaintiff in error.

San Francisco, City and County, vs. Itsell, 133 U. S. 65; Revised Statutes, Sec. 709; New Orleans Waterworks vs. Louisiana Sugar Refining Company, 125 U. S. 18; DeSaussure vs. Gaillard, 127 U. S. 216; Hale vs. Akers, 132 U. S. 554.

In San Francisco vs. Itsell, 133 U. S. 65, the Court said:

"This Court has no jurisdiction to review a judgment "of the highest Court of a State, unless a federal ques- "tion had been either in expressed terms or by necessary "effect decided by that Court against the plaintiff in "error (Authorities).

"In the present case, the record of the pleadings, "findings of facts and judgment shows that it was un- "necesssary for that Court to decide, and its opinion filed "in the case and copied in the record shows that it did not "decide, any question against the plaintiff in error except "the issue whether the former judgment rendered against "it and in favor of the grantor of the defendants in error "was a bar to this action. That was a question of general "law only, in no wise depending upon the Constitution, "treaties or statutes of the United States (*Chouteau vs. "Gibson, 111 U. S. 200*). *Writ of error dismissed for "want of jurisdiction.*"

II.

Where the decision is made on settled pre-existing rules of general jurisprudence, the case can not be brought to this Court for review.

Bank of Tennessee vs. Citizens Bank, 14 Wall. 9; Palmer vs. Morston, 14 Wall. 10; Sevier vs. Haskell, 14 Wall. 12; Dealmas vs. Insurance Co., 14 Wall. 661.

III.

Nor if decided exclusively upon the principles of jurisprudence of the State.

Marqueze vs. Bloom, 16 Wall. 351.

Respectfully submitted,

S. L. GILMORE,
City Attorney.

SUPREME COURT OF THE UNITED STATES.

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Defendant answered and averred that he held title to said property by mesne conveyances, from one Andrew C. Lewis, who acquired same at a marshal's sale, made under a writ of *fieri facias*, issued in the suit of John Klein vs. The City of New Orleans, No. 7801, of the docket of the

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The plea of *res adjudicata* was tried in the court of the first instance by way of exception, and was overruled. The case came on for trial on its merits, and judgment was rendered for plaintiff as prayed for. Defendant appealed to the Supreme Court of Louisiana, the judgment of the lower court was affirmed, and defendant is now here as plaintiff in error to this Court.

A motion to dismiss hereinbefore made in this Court, has been referred to the merits.

Argument on Question of Jurisdiction.

It is claimed that a Federal question has been raised in this case by the failure of the Supreme Court of Louis-

ana to give due force and effect to a judgment of the United States Circuit Court, which was pleaded by defendant, now plaintiff in error, as *res judicata* and estoppel.

An examination of the record will disclose the fact that the question as to whether the property in controversy was dedicated to public use or not, was not put at issue in the injunction suit of the City of New Orleans vs. John Klein, the judgment in which is here pleaded as *res judicata*, and estoppel, and that the question of the dedication of the property to public use *vel non*, is the only one involved in the case at bar. If this statement be true, how is it possible that the Supreme Court of Louisiana has failed to give due effect to the Klein judgment?

It is admitted by counsel for plaintiff in error that the question of dedication to public use was not raised in the Klein case; but he argues that the city of New Orleans having enjoined the sale of the property in its case against Klein, the judgment dismissing the city's bill of complaint, that case is conclusive not only of all matters actually determined, but of every other matter which the parties might have litigated and which might have been determined in the injunction case, and that the issue involved in this suit might have been litigated and determined in the Klein injunction suit. The sole contention of plaintiff in error is that the city of New Orleans is estopped from bringing this action, not because the issue herein was determined in the Klein injunction case, but because the issue was not presented in that case.

The Supreme Court of Louisiana as well as the Civil District Court of Louisiana differed from plaintiff in error and he now asks this Court to pass upon the question, which is in no sense a Federal question.

If the United States Circuit Court, in the Klein injunc- case, had decided the issue raised in the case at bar, and

if the State court had rendered a decision contrary to and in conflict with the decision of the Circuit Court, this Court might have jurisdiction, but such is not the fact.

As stated, the sole question involved in the case at bar is whether under the law of Louisiana, the city of New Orleans having made no appearance in the Klein case, as the administrator of public property, to assert the public's title to the property, can now be heard to set up the public's title; *i. e.*, as to whether the property is a *locus publicus* or not, and as such insusceptible of private ownership.

The solution of this question depends upon the application of the laws of the State of Louisiana.

The effect of the judgment dismissing the city's injunction suit against Klein is correctly stated by our opponent in his brief, on folio 8, as follows:

"The effect of the dismissal of the city's injunction suit was to permit the sale of the property enjoined to proceed."

From this it will be seen that our opponent does not claim that there was any judgment in the United States Circuit Court, which had determined his right to seize and sell this particular property, as property of which the city was owner. The sole issue involved in the Klein case was John Klein's right to execute his judgment, not as against this or any other particular property, but his right to execute it *at all* as against *any* property belonging to the city of New Orleans (pp. 55, 56 and 57). The judgment of the Supreme Court of Louisiana in this case does not decide that John Klein had no right to execute his judgment and to seize and sell under his *fi. fa.* any property belonging to the city of New Orleans.

The Supreme Court of Louisiana has merely decided that the property seized and sold did not belong to the city but to the public and was not subject to seizure, a

matter which the United States Circuit Court never passed upon. We fail to see that there has been any decree of the United States Courts disregarded by the State Court, or any right of the plaintiff in error under such a decree ignored, as alleged.

It is clear that the purchaser of this property at marshal's sale acquired no better title than the city of New Orleans had, regardless of the number of decrees which may have been rendered by the Circuit Court as between the city of New Orleans and John Klein. We have seen that the city of New Orleans had no title to the property, and it follows, therefore, that the purchaser at marshal's sale acquired none.

The case of San Francisco vs. Itsell, 133 U. S. 65, involved an issue similar to that presented here, and we quote the following:

"In the present case the record of the pleading, find-
" ings of facts and judgment shows that it was unneces-
" sary for that Court to decide, and its opinion filed in
" the case and copies in the record show that it did not
" decide any question against the plaintiff in error except
" the issue whether the former judgment rendered against
" it and in favor of the grant of the defendants in error
" was a bar to this action. That was a question of gen-
" eral law only, in no wise depending upon the Constitu-
" tion, treaties or statutes of the United States (Chouteau
" vs. Gibson, 111 U. S. 200). Writ of error dismissed
" for want of jurisdiction."

We take it to be well settled that where a decision is made on a pre-existing rule of general jurisprudence the case can not be brought to this court for review.

Bank of Tennessee vs. Citizens' Bank, 14 Wall, 9; Parmer vs. Morston, 14th Wall. 10; Sevier vs. Haskell, 14th Wall. 12; Dealmas vs. Insurance Company, 14th Wall. 661.

Nor if decided exclusively upon the principles of jurisprudence of the State.

Marqueze vs. Bloom, 16th Wall. 351.

Argument on Merits.

The defendant's plea of *res adjudicata* was properly over ruled by the Court below.

Article 2286 of the Civil Code of Louisiana says:

"The authority of the thing adjudged takes place only "with respect to what was the object of the judgment. "The thing demanded must be the same; the demand "must be found on the same cause of action; the demand "must be between the same parties, and formed by them "against each other in the same quality."

There are three of the elements of *res adjudicata* lacking in this case.

I.

The thing demanded in the suit of the City of New Orleans vs. John Klein, No. 8461 of the United States Circuit Court, and the thing demanded at the suit in bar are not the same.

The learned counsel for defendant is correct in his position that it is by the prayer of the petition or bill that the character of an action and the nature of the thing demanded must be determined.

The error the learned counsel falls into is that, in his argument, he confounds the thing demanded with the *cause of action* upon which the demand is based.

The prayer of the city in its bill of complaint in the suit No. 8461 of the United States Circuit Court is as follows:

"Your orator prays that the said John Klein, his attor- "neys or agents, may be restrained by an injunction issu- "ing out of this Court from proceeding further in the "advertisement and sale of the said property under the "said writ. May it please your Honors to grant unto "your orator the writ of injunction, issuing out of and "under the seal of this Court, directed to the said John "Klein, his agents or attorneys, commanding them and "each of them from proceeding further in the advertise-

" ment or sale of the said property under the said writ, " or by virtue of the said judgment.

"Your orator further prays that on a further hearing of " this case it may be decreed that the said writ of *pluries* " *fieri facias* and the seizure made thereunder are illegal, " null and void, and that the injunction herein issued may " be perpetuated, and that your orator may have gener- " ally such other and further relief as the nature of the " case may require.

"Therefore, will your Honors grant unto your orator " the writ of subpœna issuing out of and under the seal " of this Honorable Court, to be directed to said defend- " ant, John Klein, commanding him by a certain day and " under a certain penalty to appear before your Honors " in this Court, and then and there answer the premises " and abide the order and decree of the Court."

It will be noticed at once that the thing demanded in the city's suit in the United States Court was the denial of any execution on Klein's judgment, not the denial of the sale of *any particular* piece of property seized. Klein's right to the judgment and his right to the writ issued thereunder were involved, but not the title of the city to the property under seizure.

The city's injunction suit could have as well been brought after the issuance of the writ of *fieri facias*, but *before* the marshal had made a levy upon any property, and the judgment would have fully covered the subject matter of the litigation.

The subject matter of the injunction suit was not the city's title property seized, but Klein's right to seize any property.

Conceding, however, that the thing demanded in the injunction suit was something more than a denial to Klein of *any* execution on his judgment, and that it included also a denial to Klein of the sale of the particular property under seizure, the judgment dismissing the city's bill

of complaint can not constitute *res adjudicata* in this case for the simple reason that the property involved herein was not seized or sold in the case of Klein vs. the City.

All, as far as this case is concerned, that was seized in the Klein case, was:

"All the right, title and interest of the city of New " Orleans in and to the portion of ground described as " follows, together with all the right, title and interest of " said city, in and to the buildings and improvements on " said portion of ground known as the National Theatre:

"The lot of ground bounded by Baronne, Perdido, " Carroll and Poydras, measuring one hundred and " fifty feet and six inches on Baronne street, fifty-seven " feet and five inches on Perdido street, one hundred and " fifty feet and four and three-eighths inches on Carroll " street, and fifty-seven feet and five inches on the line " nearest Poydras street, which foregoing lot of ground " is subject to the usufruct of the New Orleans and Car- " rollton Railroad Company until the 9th day of Febru- " ary, 1883.

" Reference is made for more particulars to Resolution " No. 90, New Series, passed by the Common Council " and approved June 7, 1866, and to an act of agreement " passed before William J. Castell, notary public, on the " 8th day of May, 1867, by the Mayor of New Orleans, " of the first part, and by Christian Schneider and others " of the second part."

Writ of *fieri facias*, Record marked K.

The property involved in this case is not, however, the right, title and interest of the city in and to the real estate in controversy or to the improvements which stood upon the ground at the date of the marshal's sale, *it is the right, title and interest of the public in and to the real estate*, the public always having had complete right, title and interest to the ground subject to the usufruct spoken of above, and never having had any right, title and inter-

est in or to the improvements which plaintiff in error duly received and profited by.

The judgment in City vs. Klein may be *res adjudicata* as to the property seized in Klein vs. City, and may be pleaded as a bar if the city should ever set up private title in herself to the property, but it certainly is not *res adjudicata* when the public sets up its right, title and interest as it does here.

The judgment in City vs. Klein no more included the public's right to the property now in controversy, or concluded the question of the existence of the public's right, than would the seizure in that suit have included a private individual's right to his property, if such property had been erroneously seized as city property, or have prevented such individual from subsequently asserting his title. It is true that in the assertion of their public rights the city represents its citizens, but it is also true that in the case of City vs. Klein no public right was asserted and no public interest in any property involved, only the city's private interest, as distinguished from the public's, being there under seizure. Moreover, the title to property dedicated to public use does not stand in the city's name. Indeed, there is often no written title to such property.

The city owns and can own property which is alienable, and to such property she has, what we may style, private title. If under a money judgment against the city property dedicated to public use is erroneously seized as alienable property, to which the city has private title, the seizure in no way affects the public's interest in the property. Louisiana Construction Co. vs. City of New Orleans, 124 U. S.

Giving the judgment in the case of City vs. Klein its fullest effect as *res adjudicata*, all it settles is the question of the city's private right, title and interest in the real estate and improvements thereon; giving to the marshal's sale to Lewis its fullest effect, all that Lewis acquired was

the city's interest in the improvements, the city being without title to the real estate.

In this connection it is well to add that Lewis got full consideration for the small price he paid. The theatre which stood upon the ground became his, for as far as this record discloses, his possession was not interfered with by Christian Schneider and his associates, and if it had been he and transferees would have undoubtedly become absolute owners on 9th February, 1883, when the city had to pay the appraised value. The obligation of the city to pay to Schneider and his associates the appraised value of the improvements was a personal one on the part of the city, the performance of which could have been compelled by Schneider and his associates any time within ten years from 9th February, 1883, but it in no way operated as a lien upon the improvements in favor of Schneider and his associates.

The improvements, bought by Lewis, as the record will show, were transferred and retransferred until they came into the possession of the present defendant. His possession of them, or his right to any insurance paid him when they were destroyed by fire, were never questioned by the city, nor as far as we know, by Schneider and his associates.

The language of the writ of *fieri facias* suggests at once that it was the city's interest in the *improvements* and not any interest in the real estate which the city was supposed to have which Klein intended to reach by the seizure and sale.

II.

The cause of action in the suit of City vs. Klein was not the same as the cause of action in the present suit.

"What is the cause of action? It is the *immediate found-*
"*ation* of the right which one claims to exercise. It is the
"*immediate basis* of the demand, and hence we must guard

"against confounding the *cause* of action, either with the "various bases or simple means which produce this last "cause or with the *right itself* which is the object of the "demand."

Slocomb vs. De Lizardi, 21 An. 356.

The causes of action in the suit of City vs. Klein were Klein's alleged registry of his judgment under the act of 1870, and his alleged transfer to LeSassier & Binder.

The cause of action in this suit is the dedication of the property in controversy to public use.

The learned counsel for defendant, at page 5 in his brief, lays down, as a fixed and plain principle of law, the proposition that a "judgment of a court of competent ju- "risdiction is final and conclusive upon the parties, not "only as to the matter actually determined, but as to "every other matter which the parties might have litiga- "ted in the cause and might have had determined."

Mr. Freeman, however, in his work on Judgments, pages 441 and 442, Sec. 249, says:

"The general expression, often found in the reports, that a judgment is conclusive of every matter which the parties might have litigated in the action is misleading. What is really meant by this expression is that a judgment is conclusive upon the issues tendered by the plaintiff's complaint. It may be that the plaintiff might have united other causes of action with that set out in his complaint, or that the defendant might have interposed counter claims, cross bills and equitable defences, or either of the parties may have acquired new rights pending the litigation, which might, by permission of the Court, have been pleaded by supplemental complaint or answer, and, therefore, might have been litigated in the action. But as long as these several matters are not tendered as issues in the action, they are not affected by it. Whatever material allegations the plaintiff makes in his pleadings he must maintain, if they are controverted, and failing to do so, a

judgment against him is conclusive of their falsity. The defendant, on his part, must controvert all these allegations which he wishes to gainsay, and failing to do so, their truth is incontestably established as against him. He can not by failing to deny any of them, or if he denies them, by failing to offer evidence to controvert that offered by plaintiff in support of any of them, successfully claim that it has not been litigated and determiued against him. In other words, neither party can decline to meet an issue tendered by the other, and then maintain that it has not become *res adjudicata*. The plaintiff must support all the issues necessary to maintain his cause of action. The defendant must bring forward all the defences which he has to the cause of action asserted in the plaintiff's pleadings at the time they were filed. In this sense it is true that a judgment is conclusiye of every matter which might have been litigated and decided in the action. But the plaintiff is under no obligation to tender issues not necessary to support his cause of action, nor is the defendant required to meet issues not tendered by plaintiff; and if, after the defendant has fully met all the issues tendered by plaintiff, there is any matter not admissible in evidence under the pleadings it is generally not concluded by the judgment, though the parties might by different pleadings have made it an issue in the action and had it determined."

Freeman on Judgments, Vol. 1, 4th Ed., Sec. 249.

It must be also remembered that the identities required to make a matter *res adjudicata* are not the same under every system of jurisprudence, and are not everywhere fixed and defined, as in Louisiana they are by the provisions of the Code.

III.

The city, in the case of City vs. Klein, did not appear in the same quality as in the present suit.

In the injunction suit in the United States Court the city appeared in her own right, to prevent the sale of a supposed private interest in certain real estate and a real private interest in improvements on that real estate.

Here the city appears as an administrator or as a trustee for the *public*, asserting a *public* interest in certain real estate, the fact that the different interests of the city and the public happen to bear upon the same real estate being the only point of similarity between the two cases.

Nor does the alleged acquiescence by the city in the judgment in the injunction suit or in the sale of the property help defendant's position.

"Again, it is contended that the plea of *res judicata* must be held to be good, because the plaintiff acquiesced in the judgment by receiving a part of the fruits thereof. There is no doubt that acquiescence in a judgment, however manifested, constitutes what is decided by *that* judgment the thing adjudged—that is, it becomes thereby a final judgment, from which they can be no appeal." C. C., Art. 3522.

But that is all. If a judgment which has become final by the lapse of time could not be pleaded as a bar to another action on account of the want of one or more of the conditions, which we have seen are necessary to give it the authority of the thing adjudged, it could not be set up as such a bar if the judgment had become final by acquiescence." Slocomb vs. De Lizardi, 21 An., p. 357.

IV.

Defendant's plea of estoppel can not be maintained.

It is true that in the city's injunction suit in the United States Court, the City Attorney did not plead the dedication to public use of the property now in controversy, but in view of the fact already noticed, that only the city's private interest and not the public's interest in the property was under seizure at the time, the failure of the then City

Attorney to make such plea furnishes no basis for estoppel. Indeed, had the then City Attorney been guilty of fault, the public should not be precluded by his error.

Delabigarre vs. Muny. No. 2, 3 An. 236; in Canal Co. vs. City, 44 An. 396, the Court said:

"A similar plea was argued in the manner of *Municipality No. 2 vs. Orleans Cotton Press, 18 La. 272*, and the Supreme Court disposed of it in the following terms:

(P. 272.) "'The defendants urge that their rights "and those of the persons under whom they claim have "frequently been recognized by the Mayor and Aldermen "of the city, and by plaintiff, by putting them in possses "sion of sundry portions of the batture, etc., by charging "them with riparian burdens and duties, and by doing "various other acts and things. These allegations if "proven would have considerable force if the plaintiffs "sued in the right of the municipality, or if they claimed "anything belonging to the corporation; but they only "vindicate the right of the public to *loci publici*, things "out of commerce, and in which the corporation repre-"sented by the plaintiffs can have no property. The "dedication to public use being once established can not "be affected by an act of the municipal officers.

* * * * * *

"In dealing with a similar plea in *Mayor of New Orleans vs. United States, 10 Peters, 734*, the Supreme Court of the United States said:

"But in addition to the consideration that the city "authorities probably acted in ignorance of their rights, it "may be safely assumed that they had not the power, by "the acts referred to, to divest the city of a vested interest "in their common.'

"Nor does the fact that the property in controversy was assessed by the city and taxes collected thereon operate any estoppel. The acts of the municipal officers in

assessing and taxing the property were *ultra vires*, and can not in any way affect the public interest.

"A parish, or rather parochial authorities, are but the representatives within certain territory, and with limited statutory powers of the people within its territorial limits, and while their acts, within the scope of their clearly-defined granted powers, are binding upon their constituents, we can not admit that their malfeasance or misfeasance can divest such constituents of their vested rights of property."

Kline vs. Ascension, 33 An. 566.

A different rule is applied by the Courts to public corporations than that which is applied to individuals, and particularly is this true with respect to such corporations when acting as administrators or trustees of essentially public rights or public property.

In Canal Company vs. City, 44 An. 396, the Supreme Court said:

"Were ordinary litigants and private interests alone "concerned, it would doubtless be too late to obtain re-"lief, but we can not permit the public interests repre-"sented by the City of New Orleans to suffer injury by "such inadvertence of counsel. Precedents justify us in "extending such protection to municipal corporations "with a more liberal allowance than in the case of private "litigants" (1 An. 215; 3 An. 230; 4 An. 180; 7 An. 495).

Respectfully submitted,

SAM'L L. GILMORE,

City Attorney.